A

Pilecon Engineering Bhd & Ors v Malaysian Trustees Bhd & Ors

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-455–09 OF 2020
ADLIN ABDUL MAJID JC
6 JULY 2021

C

Civil Procedure — Judgment and orders — Consent judgment — Altering or varying terms of consent judgment — Whether consent judgment should be amended or varied — Whether plaintiffs should be granted an extension of time to comply with consent judgment — Whether plaintiffs should be granted relief from forfeiture

D

The plaintiffs filed an originating summons principally seeking a declaration that the consent judgment ('2019 consent judgment') was valid and binding on the parties in these proceedings. The plaintiffs also prayed for the following: (a) a declaration that the amounts due and owing by the first and second

E

plaintiffs to the defendants remain in accordance with what was agreed in the 2019 consent judgment; (b) for the first and second plaintiffs to be given a reasonable extension of time to comply with their payment obligations under the 2019 consent judgment; and (c) for the plaintiffs to be given relief from forfeiture and accordingly, the first defendant shall not commence and/or

F

proceed with auctions and/or forfeiture proceedings of the properties charged by the first, third and fourth plaintiffs ('charged properties'). The issues arose from a scheme of arrangement proposed by the first plaintiff, to restructure debts owed by the first plaintiff to a number of financial institutions. As part of the scheme, the first plaintiff issued redeemable convertible secured loan stock

G

('RCSLS') to a number of financial institutions ('RCSLS holders'), including the second to thirteenth defendants. The first defendant was appointed as trustee for the RCSLS holders pursuant to a trust deed ('RCSLS trust deed'). The first defendant was to pay amounts due under the RCSLS to the RCSLS holders at specified payment periods. Further, certain properties were

H

furnished by the first, third and fourth plaintiffs to the first defendant as security pending the conclusion of the first plaintiff's obligations pursuant to the RCSLS trust deed. A number of those properties were then auctioned off and/or sold by the first defendant to satisfy the amounts due by the first plaintiff to the RCSLS holders. The first plaintiff failed to redeem the RCSLS

I

by the specified due dates. As a result: (i) the second to thirteenth defendants commenced an action to compel the first defendant as trustee under the RCSLS trust deed to take steps to recover the amounts owing under the RCSLS; and (ii) the first plaintiff filed various actions to restrain the defendants from taking steps to pursue recovery. The outstanding actions between the

parties were resolved by way of a consent judgment ('2013 consent judgment'). The first plaintiff defaulted on the terms of the 2013 consent judgment, and the defendants proceeded to take steps to recover the amounts due. Parties also entered into a settlement agreement ('2015 settlement agreement'), premised on the terms of the 2013 consent judgment. A personal guarantee was provided by the second plaintiff pursuant to the 2015 settlement agreement. The first plaintiff, however, defaulted on the 2015 settlement agreement, resulting in the termination of the agreement. The defendants again initiated proceedings to recover amounts due to them, including proceedings against the second plaintiff as guarantor. Further actions were filed by the first plaintiff to restrain the defendants from taking recovery action. Negotiations ensued, and the 2019 consent judgment was entered into between the plaintiffs and the defendants. However, the first plaintiff was unable to make the third payment pursuant to the 2019 consent judgment, and requested the defendants for an extension to settle the payment. The first defendant agreed to a 30-day extension in accordance with the 2019 consent judgment. The plaintiffs' request for a further extension was rejected by the defendants, and the 2019 consent judgment (including the settlement letters) were terminated by the defendants. With this development, the plaintiffs filed the originating summons to seek the intervention of the court on this matter. The issues for consideration were: (A) whether the 2019 consent judgment should be amended or varied; (B) whether the plaintiffs should be granted an extension of time to comply with the 2019 consent judgment; and (C) whether the plaintiffs should be granted relief from forfeiture.

Held, dismissing the originating summons with costs of RM5,000:

(1) The 2019 consent judgment, having been agreed by the parties and drawn up in a regular manner, ought to be given its full effect. The court was functus officio and did not have the power to amend or vary the 2019 consent judgment. Further and in any event, the orders sought by the plaintiffs went well beyond facilitating the implementation of the 2019 consent judgment. The plaintiffs had gone further in seeking to amend the 2019 consent judgment in a manner which was not consistent with the initial consensus achieved between the parties. As such, this was not an appropriate case for the exercise of judicial intervention to amend or vary the 2019 consent judgment (see paras 30–31).

(2) In a case where a final judgment had been recorded, any extension of time for compliance with the judgment would necessarily involve an amendment or variation of the judgment. Thus, issues regarding the binding nature of the judgment and the circumstances (if any) that would allow amendment or variation of the judgment would need to be considered. With this finding, the other issues raised by the plaintiffs, namely the timely nature in which the originating summons was filed and the plaintiffs' argument on the lack of prejudice towards the

defendants, would not be relevant. In addition, if an extension of time was granted to the plaintiffs, there would be prejudice to the defendants. This was because of the further delay in the defendants being able to exercise their rights under the 2013 consent judgment and the 2019 consent judgment (see paras 37–39).

(3) The plaintiffs had failed to satisfy the legal requirements for relief from forfeiture due to the following: (a) relief from forfeiture was an equitable remedy, and in the limited cases in which the equitable jurisdiction to relieve was exercised, forfeiture clauses had been inserted into the contract between the parties; (b) the plaintiffs did not come to court with clean hands; (c) equitable relief should not be granted when there was a failure by the applicant to perform its obligations by a stipulated deadline, namely when parties had agreed that time was of the essence; and (d) the first defendant should not be prevented from exercising its right as a chargee of the charged properties, under the National Land Code (see para 44).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula khususnya untuk memohon pengisytiharan bahawa penghakiman persetujuan ('penghakiman persetujuan 2019') adalah sah dan mengikat pihak-pihak dalam prosiding ini. Plaintif juga memohon perkara berikut: (a) pengisytiharan bahawa amaun yang perlu dibayar dan terhutang oleh plaintif pertama dan kedua kepada defendan kekal mengikut apa yang dipersetujui dalam penghakiman persetujuan 2019; (b) untuk plaintif pertama dan kedua diberi lanjutan masa yang munasabah untuk mematuhi kewajipan pembayaran mereka di bawah penghakiman persetujuan 2019; dan (c) agar plaintif diberi relif daripada pelucuthakan dan oleh itu, defendan pertama tidak boleh memulakan dan/atau meneruskan dengan lelongan dan/atau prosiding pelucuthakan harta yang dicagar oleh plaintif pertama, ketiga dan keempat ('harta yang dicagar') . Isu-isu itu timbul daripada skema pengaturan yang dicadangkan oleh plaintif pertama, untuk menstruktur semula hutang yang terhutang oleh plaintif pertama kepada beberapa institusi kewangan. Sebagai sebahagian daripada skema tersebut, plaintif pertama mengeluarkan Stok Pinjaman Bercagar Boleh Tukar Boleh Tebus ('RCSLS') kepada beberapa institusi kewangan ('pemegang RCSLS'), termasuk defendan kedua hingga ketiga belas. Defendan pertama dilantik sebagai pemegang amanah bagi pemegang RCSLS menurut surat ikatan amanah ('surat ikatan amanah RCSLS'). Defendan pertama perlu membayar jumlah yang perlu dibayar di bawah RCSLS kepada pemegang RCSLS pada tempoh pembayaran yang ditetapkan. Selanjutnya, hartanah tertentu telah diserahkan oleh plaintif pertama, ketiga dan keempat kepada defendan pertama sebagai jaminan sementara menunggu tamatnya kewajipan plaintif pertama menurut surat ikatan amanah RCSLS. Sebilangan daripada hartanah tersebut kemudiannya dilelong dan/atau dijual oleh defendan pertama untuk

memenuhi jumlah yang perlu dibayar oleh plaintif pertama kepada pemegang RCSLS. Plaintif pertama gagal menebus RCSLS mengikut tarikh akhir yang ditetapkan. Akibatnya: (i) defendan kedua hingga ketiga belas memulakan tindakan untuk memaksa defendan pertama sebagai pemegang amanah di bawah surat ikatan amanah RCSLS untuk mengambil langkah untuk mendapatkan semula jumlah terhutang di bawah RCSLS; dan (ii) plaintif pertama memfailkan pelbagai tindakan untuk menghalang defendan daripada mengambil langkah untuk meneruskan pemulihan. Tindakan tertunggak antara pihak-pihak telah diselesaikan dengan cara penghakiman persetujuan ('penghakiman persetujuan 2013'). Plaintif pertama ingkar pada terma penghakiman persetujuan 2013, dan defendan terus mengambil langkah untuk mendapatkan semula jumlah yang perlu dibayar. Pihak juga memeterai perjanjian penyelesaian ('perjanjian penyelesaian 2015'), berdasarkan syarat penghakiman persetujuan 2013. Jaminan peribadi telah diberikan oleh plaintif kedua menurut perjanjian penyelesaian 2015. Plaintif pertama, bagaimanapun, ingkar pada perjanjian penyelesaian 2015, menyebabkan perjanjian itu ditamatkan. Defendan sekali lagi memulakan prosiding untuk mendapatkan semula jumlah terhutang kepada mereka, termasuk prosiding terhadap plaintif kedua sebagai penjamin. Tindakan lanjut telah difailkan oleh plaintif pertama untuk menghalang defendan daripada mengambil tindakan pemulihan. Rundingan berlaku, dan penghakiman persetujuan 2019 dimeterai antara plaintif dan defendan. Bagaimanapun, plaintif pertama tidak dapat membuat pembayaran ketiga menurut penghakiman persetujuan 2019, dan meminta defendan untuk lanjutan masa bagi menyelesaikan pembayaran. Defendan pertama bersetuju dengan lanjutan 30 hari mengikut penghakiman persetujuan 2019. Permintaan plaintif untuk lanjutan selanjutnya telah ditolak oleh defendan, dan penghakiman persetujuan 2019 (termasuk surat penyelesaian) telah ditamatkan oleh defendan. Dengan perkembangan ini, plaintif memfailkan saman pemula untuk mendapatkan campur tangan mahkamah berhubung perkara ini. Isu-isu untuk pertimbangan adalah: (A) sama ada penghakiman persetujuan 2019 perlu dipinda atau diubah; (B) sama ada plaintif perlu diberikan lanjutan masa untuk mematuhi penghakiman persetujuan 2019; dan (C) sama ada plaintif patut diberi relif daripada pelucuthakan.

Diputuskan, menolak saman pemula dengan kos RM5,000:

(1) Penghakiman persetujuan 2019, yang telah dipersetujui oleh pihak-pihak dan disediakan dengan cara teratur, harus diberi kesan sepenuhnya. Mahkamah adalah functus officio dan tidak mempunyai kuasa untuk meminda atau mengubah penghakiman persetujuan 2019. Selanjutnya dan dalam apa jua keadaan, perintah yang dipohon oleh plaintif melangkaui memudahkan pelaksanaan penghakiman persetujuan 2019. Plaintif telah pergi lebih jauh dalam usaha untuk meminda penghakiman persetujuan 2019 dengan cara yang tidak

konsisten dengan konsensus awal yang dicapai antara pihak-pihak. Oleh itu, ini bukanlah kes yang sesuai untuk menjalankan campur tangan kehakiman untuk meminda atau mengubah penghakiman persetujuan 2019 (lihat perenggan 30–31).

(2) Dalam kes di mana penghakiman muktamad telah direkodkan, apa-apa lanjutan masa untuk pematuhan penghakiman itu semestinya melibatkan pindaan atau pengubahan penghakiman. Oleh itu, isu mengenai sifat mengikat penghakiman dan keadaan (jika ada) yang membenarkan pindaan atau perubahan penghakiman perlu dipertimbangkan. Dengan dapatan ini, isu-isu lain yang dibangkitkan oleh plaintif, iaitu sifat tepat pada masanya di mana saman pemula difailkan dan hujahan plaintif mengenai ketiadaan prejudis terhadap defendan, adalah tidak relevan. Di samping itu, jika lanjutan masa diberikan kepada plaintif, terdapat prejudis kepada defendan. Ini adalah kerana kelewatan selanjutnya kepada defendan dalam menggunakan hak mereka di bawah penghakiman persetujuan 2013 dan penghakiman persetujuan 2019 (lihat perenggan 37–39).

(3) Plaintif telah gagal untuk memenuhi keperluan undang-undang untuk relif daripada pelucuthakan disebabkan perkara berikut: (a) relif daripada pelucuthakan adalah remedi yang berekuiti, dan dalam kes terhad di mana bidang kuasa berekuiti untuk relif telah dilaksanakan, klausa pelucuthakan telah dimasukkan ke dalam kontrak antara pihak; (b) plaintif tidak hadir ke mahkamah dengan suci hati; (c) relif berekuiti tidak seharusnya diberikan apabila pemohon gagal melaksanakan kewajipannya pada tarikh akhir yang ditetapkan, iaitu apabila pihak-pihak telah bersetuju bahawa masa adalah penting; dan (d) defendan pertama tidak seharusnya dihalang daripada melaksanakan haknya sebagai pemegang cagaran bagi harta yang dicagar, di bawah Kanun Tanah Negara (lihat perenggan 44).]

Cases referred to

Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and Another Appeal [2018] 5 MLJ 125, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors [2013] 7 MLJ 196, HC (folld)

Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd [1978] 1 MLJ 130, FC (refd)

Courts Mammoth Bhd v Subramaniam a/l Paramasivam [2007] 4 MLJ 544, HC (refd)

Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538, CA (refd)

Gai Hin Refigeration Sdn Bhd v Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57, CA (refd)
Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (refd)
Lim Lay Sooi & Anor v Merah Rubber Estates (1931) Ltd [1951] 1 MLJ 246, CA (refd)
National Union of Bank Employees v Director General of Trade Unions & Anor [2013] 6 MLJ 167, FC (refd)
Phuah Beng Chooi @ Koh Kim Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors [2007] 2 MLJ 458, HC (folld)
Qukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5) [2015] 2 WLR 875, PC (refd)
Shiloh Spinners Ltd v Harding [1973] AC 691, HC (refd)
Sneakerboy Retail Pty Ltd (t/as Sneakerboy) v Georges Properties Pty Ltd and another (2020) 19 BPR 40,443, SC (refd)
Sports Internationaal Bussum BV & Ors v Inter-Footwear Ltd [1984] 1 WLR 776, HL (refd)
Steedman v Drinkle [1916] 1 AC 275, PC (refd)
Stickney v Keeble [1915] AC 386, HL (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465, FC (refd)
Tan Sri Datuk Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 2) [2003] MLJU 347, HC (refd)
Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514, PC (refd)
Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd [2019] 2 WLR 330, CA (refd)
Zaini bin Che Awang & Ors v Pegawai Penerima Syarikat Cosmopro Planner Sdn Bhd [2015] 11 MLJ 410, HC (refd)

Legislation referred to

National Land Code
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 7
Rules of Court 2012 O 3 r 5(1), (2), O 92 r 4
Rules of the High Court 1980 O 92 r 4

Ivanpal Singh Grewal (James Au with him) (AJ Ariffin Yeo & Harpal) for the plaintiffs.
Marianne Loh Suet May (Peter Neik Xiang Sheng with her) (Shook Lin & Bok) for the defendants.

Adlin Abdul Majid JC:

INTRODUCTION

[1] The plaintiffs filed an originating summons principally seeking a declaration that the consent judgment dated 8 November 2018 in Suit No WA-22NCC-125–04 of 2018 ('2019 consent judgment') is valid and binding on the parties in these proceedings.

[2] Further, the plaintiffs also prayed for the following:

(a) a declaration that the amounts due and owing by the first and second plaintiffs to the defendants remain in accordance with what was agreed in the 2019 consent judgment;

(b) for the first and second plaintiffs to be given a reasonable extension of time to comply with their payment obligations under the 2019 consent judgment; and

(c) for the plaintiffs to be given relief from forfeiture and accordingly, the first defendant shall not commence and/or proceed with auctions and/or forfeiture proceedings of the properties charged by the first, third and fourth plaintiffs ('charged properties').

[3] I dismissed the originating summons. The reasons for the dismissal are set out below.

BACKGROUND FACTS

[4] As a start, I feel that it is important to set out, with sufficient details, the background facts of this matter, and specifically the various actions filed by the parties, and their attempts at settlement over the years. These fact are important to provide a clear understanding of the relationship between the parties, and why the parties are taking their respective positions in this matter.

Scheme of arrangement

[5] The issues arose from a scheme of arrangement proposed by the first plaintiff, to restructure debts owed by the first plaintiff to a number of financial institutions. As part of the scheme, the first plaintiff issued redeemable convertible secured loan stock ('RCSLS') to a number of financial institutions ('RCSLS holders'), including the second to 13th defendants. The first defendant was appointed as trustee for the RCSLS holders pursuant to a trust deed dated 6 November 2006 ('RCSLS trust deed').

[6] The first defendant was to pay amounts due under the RCSLS to the RCSLS holders at specified payment periods. Further, certain properties were furnished by the first, third and fourth plaintiffs to the first defendant as security pending the conclusion of the first plaintiff's obligations pursuant to the RCSLS trust deed. A number of those properties were then auctioned off and/or sold by the first defendant to satisfy the amounts due by the first plaintiff to the RCSLS holders.

Disputes between the parties and attempts at settlement

[7] The first plaintiff failed to redeem the RCSLS by the specified due dates. As a result:

(a) the second to 13th defendants commenced an action to compel the first defendant as trustee under the RCSLS trust deed to take steps to recover the amounts owing under the RCSLS; and

(b) the first plaintiff filed various actions to restrain the defendants from taking steps to pursue recovery.

[8] The outstanding actions between the parties were resolved by way of of a consent judgment dated 11 July 2013 in Suit No WA-22NCC-778–05 of 2012 ('2013 consent judgment'). The 2013 consent judgment required the first plaintiff to make payments on amounts due to the second to 13th defendants, by specified due dates. The first plaintiff defaulted on the terms of the 2013 consent judgment, and the defendants proceeded to take steps to recover the amounts due.

[9] Parties also entered into a settlement agreement dated 5 March 2015 ('2015 settlement agreement'), premised on the terms of the 2013 consent judgment. A personal guarantee was provided by the second plaintiff pursuant to the 2015 settlement agreement. The first plaintiff however defaulted on the 2015 settlement agreement, resulting in termination of the agreement.

[10] The defendants again initiated proceedings to recover amounts due to them, including proceedings against the second plaintiff as guarantor. Further actions were filed by the first plaintiff to restrain the defendants from taking recovery action. Negotiations ensued, and the 2019 consent judgment was entered into between the plaintiffs and the defendants.

[11] The relevant terms of the 2019 consent judgment are as follows:

(a) the second plaintiff shall pay RM60m, with interest, to the first defendant; and

A (b) the enforcement of the 2019 consent judgment is subject to terms contained in Messrs Shook Lin & Bok's letters dated 30 October 2019 and 6 November 2019 ('settlement letters').

B **[12]** The terms of the settlement letters, which have been duly accepted by the parties, include the following:

(a) payments shall be made by the first and second plaintiffs in three tranches, including the third payment of RM45,000,000, due by 15 June 2020;

C (b) no extension is allowed for the first and second payments. However, for the third payment, an automatic extension of 30 days will be granted, subject to payment of interest on the outstanding amount;

(c) time whenever mentioned in the settlement letters shall be of the D essence;

(d) in the event of default of payments or terms of the settlement letters, the defendants are at liberty to forthwith exercise their rights: (i) to recover the judgment sums due under the 2013 consent judgment against the E first plaintiff and the 2019 consent judgment against the second plaintiff; and (ii) to have the charged properties disposed of without any further reference to the plaintiffs; and

(e) the terms of the settlement letters are non-negotiable.

F **[13]** The first plaintiff was unable to make the third payment pursuant to the 2019 consent judgment, and requested the defendants for an extension to settle the payment. The first defendant agreed to a 30-day extension in accordance with the 2019 consent judgment.

G **[14]** The plaintiffs' request for a further extension was rejected by the defendants, and on 17 July 2020, the 2019 consent judgment (including the settlement letters) were terminated by the defendants.

H **[15]** With this development, the plaintiffs filed the originating summons to seek the intervention of the court on this matter.

CONSIDERATIONS

I **[16]** The issue for determination by this court centres on the status of the 2019 consent judgment, and whether it can (and should) be amended or varied.

[17] The plaintiffs and the defendants do not disagree that the 2019 consent

judgment is binding on the parties. However, the disagreement between the parties arises due to the argument raised by the plaintiffs that the court should exercise its discretion in the following manner:

(a) to amend or vary the 2019 consent judgment;

(b) to an grant an extension of time for the plaintiffs to comply with the 2019 consent judgment; and/or

(c) to grant the plaintiffs relief from forfeiture.

[18] I will address each issue raised by the plaintiffs.

Whether the 2019 consent judgment should be amended or varied

[19] To support the plaintiffs' stand that the 2019 consent judgment should be amended or varied, learned counsel for the plaintiffs, Mr Ivanpal Singh Grewal, referred to *Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors* [2013] 7 MLJ 196. In this case, Mary Lim J (as Her Ladyship then was) held that once a judgment has been properly and regularly drawn up and perfected, the judgment cannot be altered, varied or set aside in the same action by the same court. Her Ladyship went on hold that this principle would also apply to a consent order:

> [19] The position is no different even where the order or its terms were procured by consent — see *Tong Lee Hwa & Anor v Chin Ah Kwi Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75. In fact, where the order was by consent, the Federal Court in *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145, said that an order by consent is evidence of the contract between the parties and is binding on all parties to the order'. This was reiterated by the Court of Appeal in *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* at p 58 (MLJ); p 238 (CLJ). In *Mayban Allied Bhd v Kenneth Godfrey Gomez & Anor & Another Appeal* at p 227 (MLJ); p 711 (CLJ), the Court of Appeal further opined that:
>
> > Once the appellant and the respondents took the matter beyond contract and recorded a consent order then they must accept all the implications of a court judgment or order. In this sense the court now cannot vary the terms of the order.
>
> [20] *In other words, regardless of the fact that the terms of a court order were arrived at by consent, that consent order is nevertheless a judgment of the court which has every force of law*. (Emphasis added.)

[20] The defendants do not disagree with this position. Ms Marianne Loh, learned counsel for the defendants, referred to the same case relied on by the court in *Chew Hon Keong*, namely *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145. She also made reference to *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465. In these cases, the courts upheld the binding nature of consent orders.

[21] It was further argued by Ms Loh that:

(a) the plaintiffs are estopped from unilaterally amending the 2019 consent judgment (see *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331); and

(b) this court is functus officio and does not have the power to amend or vary the 2019 consent judgment (see *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; *Gai Hin Refigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2005] 1 MLJ 57 and *Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and Another Appeal* [2018] 5 MLJ 125).

[22] However, learned counsel for the plaintiffs argued that in this case, the court is warranted to relook at the terms of the 2019 consent judgment. He referred to *Chew Hon Keong*, where Mary Lim J (as Her Ladyship then was), after considering the decisions of the Court of Appeal and the Federal Court on the finality of judgments, found that it is not in all cases that the courts decline to revisit an earlier order made. The learned judge held as follows:

> [36] ... The first rule, of course, is that once perfected, a proper order is not to be varied, altered or amended. It remains closed unless, of course, 'in the circumstances the jurisdiction exercised by the court is justified' — per Raja Azlan Shah CJ (as His Highness then was) in *Ganapathy Chettiar,* p 146.
>
> [37] *In determining whether the circumstances warrant a second look at the terms of the order, including one reached by consent, the terms and the conduct of the parties are relevant considerations*. The provision of a 'liberty to apply' suggests that parties have expressly reserved their right to return to court for either further orders or directions. This phrase, 'liberty to apply', is a term agreed between the parties giving themselves an opportunity to approach the court again *on matters relating to or for the purpose of implementing and giving effect to the order*. (Emphasis added.)

[23] The plaintiffs argued that though not expressed, 'liberty to apply' is implicit in the 2019 consent judgment. Further, they are of the view that this is an appropriate case for judicial intervention, due to the terms of the 2019 consent judgment and the change in circumstance which occurred after the 2019 consent judgment.

[24] On this, I am guided by the findings of Mary Lim J (as Her Ladyship then was) in the same case that the plaintiffs referred to, namely *Chew Hon Keong*. As the learned judge considered whether judicial intervention was justified, Her Ladyship first described the efforts put in by parties in taking steps to comply with the consent order. She then opined as follows:

> [47] The court cannot ignore all these efforts of both parties. Such efforts are in fact the parties' endeavors towards implementation of the terms of the consent order. *Unfortunately, the parties have run into practical problems. The solutions for such*

problems were not provided for in the terms of the consent order. That is not to be unexpected as more often than not, it is the substantive matters that are incorporated as part of the terms of a consent order. When drawing up terms of settlement for consent of the parties, the parties are generally looking at resolution and not drafting with an anticipation that the settlement will fail or is bound to fail.

[48] Considering that the accord was reached in the atmosphere of a settlement by mediation which was assisted by the court, *it is reasonable to conclude that it is precisely for circumstances such as those presented today that an express provision for a 'liberty to apply' was incorporated. Such a term assured the parties that they could approach the court to deal with any matter arising from the implementation of the terms of the consent order*. Given the facts and attendant circumstances of this case, the court cannot also be said to be powerless to compel compliance of the parties to the bargain that they had agreed upon in the consent order. As said in *Kanawagi s/o Seperumaniam, p 468, '... the court is lex non deficit in justitia exhibenda which in simple English means that the law does not fail in dispensing justice'.*

[49] From the evidence presented, I am of the view that the terms of the consent order are still capable of implementation and given effect to. *The orders sought by the petitioner are largely consistent with the terms of the consent order* as opposed to those sought by the respondents. *What the court has been asked to do is to unlock the deadlock that the parties were at in terms of the time compliance and the appointment of the independent accountant so that the dispute between them can be finally concluded*.

[50] It is for those reasons that only prayers (a) and (b)(i) and (ii) of encl 34 are granted. These orders will *facilitate the parties towards the full implementation of the accord that they had reached*. It is only just that they be assisted towards that end. (Emphasis added.)

[25] Based on the above, it is clear that *Chew Hon Keong* involved the court exercising its discretion to facilitate the implementation of the consent order. The court found that the orders sought were consistent with the original terms of the consent order, and that it was exercising discretion to 'unlock the deadlock' so that the dispute between the parties can be finally concluded.

[26] In this case, unlike *Chew Hon Keong* the orders sought by the plaintiffs do not merely involve the court giving further orders to facilitate the implementation of the 2019 consent judgment. On the other hand, the plaintiffs are seeking to amend or vary the 2019 consent judgment by extending the date of payment, in a manner that would effectively undo the consensus achieved between the parties.

[27] Further, I do not find 'liberty to apply' to court to be implicit in the 2019 consent judgment. This is because the terms of the settlement letters are expressly stated to be final and non-negotiable.

[28] The plaintiffs also urged the court to exercise its inherent powers under O 92 r 4 of the Rules of Court 2012. The plaintiffs referred to *Tan Sri Datuk*

A *Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 2)* [2003] MLJU 347, in support of their argument. I disagree with the plaintiffs' argument, as this is not a case where the inherent powers of the court would need to be exercised to prevent injustice or abuse of process of the court (which is a requirement in O 92 r 4). I am further guided by *Phuah Beng Chooi @ Koh Kim*
B *Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors* [2007] 2 MLJ 458, which is also a case where the court was invited to exercise its powers under O 92 r 4 of the Rules of the High Court 1980 (which is in pari materia with O 92 r 4 of the Rules of Court 2012). The learned judge however declined to
C do so due to the existence of a consent order, which he held to be binding and served as an estoppel.

[29] The plaintiffs also contend that there is a material change of circumstance, namely the COVID-19 pandemic, which has adversely affected
D the first plaintiff, a company in the construction business. The plaintiff referred to s 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 which recognises construction contracts as contracts being adversely affected by the COVID-19 pandemic. However, I find this argument to be untenable, because the plaintiffs (and in particular the
E first plaintiff) had breached their payment obligations multiple times in previous consent judgments and settlement arrangements between the parties. All of this had occurred prior to the COVID-19 pandemic.

[30] Based on the assessment above, I find that:
F

(a) the 2019 consent judgment, having been agreed by the the parties and drawn up in a regular manner, ought to be given its full effect; and

(b) the court is functus officio and does not have the power to amend or vary the 2019 consent judgment.
G

[31] Further and in any event, the orders sought by the plaintiffs go well beyond facilitating the implementation of the 2019 consent judgment. The plaintiffs have gone further in seeking to amend the 2019 consent judgment in
H a manner which is not consistent with the initial consensus achieved between the parties. As such, I am of the view that this is not an appropriate case for the exercise of judicial intervention to amend or vary the 2019 consent judgment.

Whether the plaintiffs should be granted an extension of time to comply with the
I *2019 consent judgment*

[32] The plaintiffs have also moved this court pursuant to O 3 r 5(1) of the Rules of Court 2012 to extend the time for compliance with the 2019 consent judgment. O 3 r 5(1) and (2) provide that:

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as referred to in paragraph (1), although the application for extension is not made until after the expiration of that period.

[33] Learned counsel for the plaintiffs referred to *National Union of Bank Employees v Director General of Trade Unions & Anor* [2013] 6 MLJ 167 and *Zaini bin Che Awang & Ors v Pegawai Penerima Syarikat Cosmopro Planner Sdn Bhd* [2015] 11 MLJ 410 to support its argument that the court has jurisdiction to extend time to comply with the 2019 consent judgment.

[34] Further, the plaintiffs highlighted that the originating summons was filed in a timely manner, within two months of the third payment under the 2019 consent judgment being due. In support, the plaintiffs referred to *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223, where the Court of Appeal held that a litigant seeking to enforce a right must do so timeously.

[35] The plaintiffs also argue that if the extension of time is allowed, there is no prejudice to the defendants. This is because pursuant to the terms of the 2019 consent judgment, late interests arising from the delay in making the third payment will be paid to the defendants. On this issue, the plaintiffs relied on *Courts Mammoth Bhd v Subramaniam a/l Paramasivam* [2007] 4 MLJ 544, where the High Court granted an extension of time for the plaintiff to file affidavits, as the learned judge found that the extension of time will not cause any prejudice to the defendant which cannot be compensated by an award of costs.

[36] However, I find that the plaintiffs' reliance on cases where courts exercised discretion to extend a time frame or time period to be misconceived, as these cases involve steps where proceedings are ongoing, and not where a judgment, or in this case a consent judgment, has been finalised and recorded by the court.

[37] In a case where a final judgment has been recorded, any extension of time for compliance with the judgment will necessarily involve an amendment or variation of the judgment. Thus, issues regarding the binding nature of the judgment and the circumstances (if any) that would allow amendment or variation of the judgment, as discussed in paras [19]–[31] above, would need to be considered.

[38] With this finding, the other issues raised by the plaintiffs, namely the timely nature in which the originating summons is filed and the plaintiffs' argument on the lack of prejudice towards the defendants, would not be relevant.

[39] Nonetheless, ensure that this matter is clear, I will address the issue of prejudice. I am the view that if an extension of time is granted to the plaintiffs, there will be prejudice to the defendants. This is because of the further delay in the defendants being able to exercise their rights under the 2013 consent judgment and the 2019 consent judgment. At this point, it is important to be reminded that the rights of the defendants to claim against the plaintiffs arose from defaults arising from the RCSLS trust deed, which occurred almost a decade ago.

Whether the plaintiffs should be granted relief from forfeiture

[40] The final argument raised by learned counsel for the plaintiffs is for the plaintiffs to be granted relief from forfeiture. If granted, this would mean that the charged properties would be prevented from being forfeited and auctioned off by the first defendant. The plaintiffs relied on *Lim Lay Sooi & Anor v Merah Rubber Estates (1931) Ltd* [1951] 1 MLJ 246; *Qukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2015] 2 WLR 875; and *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2019] 2 WLR 330. These are cases where courts allowed relief from forfeiture.

[41] The plaintiffs believed that they should be granted relief from forfeiture because they have a legitimate interest in the performance of their obligations pursuant to the 2019 consent judgment but were unable to do so, primarily due to the COVID-19 pandemic. Referring to *Vauxhall Motors Ltd*, the plaintiffs argued that their default is not intentional but is due to the fact that the first plaintiff is a victim of circumstances.

[42] Further, the plaintiffs argued, quoting *Shiloh Spinners Ltd v Harding* [1973] AC 691, that relief from forfeiture ought to be granted to the plaintiffs as the the defendants will nonetheless be compensated in the amount of interests to be paid by the plaintiffs to the defendants.

[43] The plaintiff also referred to *Sneakerboy Retail Pty Ltd (t/as Sneakerboy) v Georges Properties Pty Ltd and another* (2020) 19 BPR 40, 443, a case where relief from forfeiture was granted to the lessee by the Supreme Court of New South Wales, as the lessee's business was affected by the COVID-19 pandemic.

[44] After considering the arguments of the plaintiffs, I find that the plaintiffs have failed to satisfy the legal requirements for relief from forfeiture. This is due to the following:

(a) relief from forfeiture is an equitable remedy, and in the limited cases in which the equitable jurisdiction to relieve is exercised, forfeiture clauses had been inserted into the contract between the parties (see *Sports Internationaal Bussum BV & Ors v Inter-Footwear Ltd* [1984] 1 WLR 776). In *Shiloh Spinners Ltd v Harding*, Lord Wilberforce, delivering judgment for the House of Lords held as follows:

> I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. *But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases* to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and *where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach*. (Emphasis added.)

(b) The plaintiffs did not come to court with clean hands. Learned counsel for the defendants referred to *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd* [1978] 1 MLJ 130. The Federal Court, in dismissing the application for relief against forfeiture held that equitable relief is intended to 'preserve the sanctity of the bargain', and that the conduct of parties is a consideration in deciding whether relief should be granted and on what terms. In *Eastern Properties Sdn Bhd v Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538, Gopal Sri Ram JCA (as His Lordship then was), made the following observations:

> [14] It is beyond argument that equitable doctrines are not to be dealt with in a rigid fashion. They are by their very nature flexible and meant to be applied in such a fashion as produces a just result on the facts and circumstances of a given case. *But there are certain basic threads that have been woven into the fabric of equitable doctrines through the pronouncements in the leading cases on the subject. One of these is that a supplicant who prays in aid equitable assistance must himself or herself be not guilty of equitable misconduct. This is sometimes put in the form of the maxim: He who comes to equity must come with clean hands*. So, a contract breaker cannot successfully invoke the remedy of specific performance. So too, a trespasser may be unable to restrain the true owner of land from denying him access. Likewise, a tenant who is guilty of a breach of a covenant in his lease may be refused equitable relief from forfeiture. These are all but individual illustrations of the basic fabric.
>
> [15] Now apply that to the present case. Here we have a litigant which is

A guilty of a failure to abide by the promise it had made. It would be contrary to all principles of equity to allow it to succeed. (Emphasis added.)

(c) equitable relief should not be granted when there is a failure by the applicant to perform its obligations by a stipulated deadline, namely when parties have agreed that time is of the essence (see *Stickney v Keeble* [1915] AC 386; *Steedman v Drinkle* [1916] 1 AC 275 and *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514). In this case, the settlement letters expressly state that time is of the essence, and there has been a failure by the first plaintiff to make the third payment in accordance with the consent judgment; and

(d) the first defendant should not be prevented from exercising its right as a chargee of the charged properties, under the National Land Code ('NLC'). The defendants explained that the reserve prices of the charged properties will be determined the court pursuant to the relevant provisions of the NLC. Thus, the plaintiffs' allegation that the defendants would enjoy a 'windfall' from the auction of the charged properties is unsubstantiated. Further, the defendants have taken the position that even if the values of charged properties are realised, the amounts may be insufficient to pay the amount owing by the first and the second plaintiffs to the defendants under the 2013 consent judgment and the 2019 consent judgment respectively.

DECISION

[45] Based on the considerations set out above, I find the plaintiffs' arguments, namely:

(a) that the court should exercise its discretion to amend or vary the 2019 consent judgment;

(b) that the plaintiffs should be granted an extension of time to comply with the 2019 consent judgment; and/or

(c) that the plaintiffs should be granted relief from forfeiture,

have failed on all counts.

[46] Thus, I dismissed the originating summons (encl 1), with costs of RM5,000 to be paid by the plaintiffs to the defendants.

Originating summons dismissed with costs of RM5,000.

Reported by Nabilah Syahida Abdullah Salleh